



POLICE DEPARTMENT

November 2, 2007

MEMORANDUM FOR: POLICE COMMISSIONER

Re: Police Officer Deevan Dyal
Tax Registry No. 934811
67 Precinct
Disciplinary Case No. 82731/07

The above-named member of the Department appeared before me on July 27, 2007, charged with the following:

1. Said Police Officer Deevan Dyal, while assigned to the 67 Precinct and while on duty on October 5, 2005, at or about 0040 hours in the vicinity of 9720 Kings Highway, Apartment 305, Kings County, used excessive force against an individual known to the Department by kicking said individual in the face causing said individual to lose a tooth.

P.G. 203-11, Page 1, Paragraph 2 – FORCE

The Department was represented by Vincent Verdi, Esq., Department Advocate's Office, and the Respondent was represented by John Tynan, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

EVIDENCE

The Department's Case

The Department called Dania Reid and Erickson Jinaut as witnesses.

Dania Reid

Reid is a former investigator for the Civilian Complaint Review Board (CCRB). On January 20, 2006, she interviewed Hilda Gonzalez.

[Department's Exhibit (DX) 1 and 1A are the tape and transcript of Gonzalez's interview. In the interview, Gonzalez stated that on October 5, 2005 she was at her Brooklyn home with Erickson Jinaut. She and Jinaut have two children together. At approximately 12:40 a.m., they started to fight because Jinaut did not believe Gonzalez was giving him enough sexual attention. When Gonzalez walked out of the room, Jinaut threw a baby seat at her. When Gonzalez returned to the room, she threw a plate of food at him. Jinaut then threw the plate back at Gonzalez, cutting her foot. At that point, Jinaut started packing a bag for Gonzalez, told her to move out, and made a comment about burning her clothes. Gonzalez was mad and nervous and called the police. Although there were not any matches in the house, Gonzalez mentioned in the 911 call that Jinaut was playing with matches. Gonzalez also told the police that Jinaut had been handling a knife. Seven police officers arrived at the scene. According to Gonzalez, three officers quickly left, but four of them remained. When the police arrived, Jinaut was calmly watching television.

Gonzalez stated that the police officers told Jinaut two or three times to leave the premises. Jinaut's two-year-old son was crying, and Jinaut told the officers that he would not leave until he took his son for a walk. He explained to the officers that walking was the best way to get the child back to sleep. Gonzalez did not want Jinaut to take the child outside, so the officers reiterated that Jinaut should leave. Finally, Jinaut walked out into the building's hallway. Gonzalez did not recall Jinaut ever kicking the front door of the apartment. Meanwhile Jinaut's son walked to the half-open door. When Jinaut stepped forward to say goodbye to his son, one of the officers snatched the son, thereby causing the son's shoulder to strike against the wall. Jinaut became upset and loudly asked, "What are you doing?" The officer replied, "[D]on't tell [me] what the fuck to do." At that point, another of the officers said, "[H]e's going down tonight." All four officers ran to Jinaut. From her location, Gonzalez could not see the officers' initial physical contact with Jinaut. By the time she reached the hallway area, the officers had already taken Jinaut down to the ground and handcuffed his left hand. The officers were trying to get Jinaut's right hand. Two of the officers had their knees on Jinaut's legs and back. Jinaut was trying to wiggle. Meanwhile, according to Gonzalez, one of the officers repeatedly kicked Jinaut in the face and said, "[Y]ou don't feel tough anymore, big guy." Gonzalez told that officer that there was no need to kick Jinaut, but the officer would not stop kicking.¹ Gonzalez observed Jinaut spit blood and a tooth fall out of Jinaut's mouth. Gonzalez stated that in total Jinaut was kicked seven or eight times. At first the officer kicked Jinaut on the right cheek, but at one point Jinaut turned his head and the kicks landed more on the forehead, top of the head, back of the head, and ear. After the officers brought Jinaut to his feet, Gonzalez observed blood gush out of his mouth.

¹ Gonzalez described the officer who kicked Jinaut as a dark-skinned, Arabic officer named Doyle.

Gonzalez used two paper towels to wipe the blood off of the floor. In total, it took approximately five minutes for the officers to successfully handcuff Jinaut.

Jinaut was transported to the station house. From there, he called Gonzalez and told her he was hurt. He also told her that whenever he asked for medical treatment, the police told him to "hold on." Jinaut never received medical treatment while in custody. When he was released three days later, he went to Brookdale Hospital. Gonzalez ultimately informed the District Attorney's Office that she wanted the charges against Jinaut to be dropped. Gonzalez stated that she at no point saw Jinaut use physical force against the officers.

Court Exhibit 1 is a copy of a Department Advocate's Office Investigating Officer's Report, dated May 18, 2007, indicating that Gonzalez informed a Department investigator that she was living in a shelter for battered women and was in fear for her life from Jinaut. Gonzalez also told the investigator that she wanted nothing to do with Jinaut and could not divulge her living location.]

On cross-examination, Reid acknowledged that Jinaut was resisting arrest which made it necessary for some of the responding officers to use force to restrain him. She also acknowledged that Gonzalez called 911 because she was afraid that Jinaut might cause her injury which resulted in Gonzalez calling the police for protection. Reid then testified that a number of the officers that were accused by Erickson Jinaut of using excessive force were ultimately exonerated by CCRB.

Erickson Jinaut

Jinaut is currently employed as a security guard. He testified that at approximately 12:40 a.m. on October 5, 2005, he was at home at 9720 Kings Highway in Brooklyn when he became involved in a heated argument with his ex-wife, Gonzalez. He threw a baby bouncer at Gonzalez, and she threw a plate at him. When he threw the plate back at her, it broke, cutting Gonzalez's foot. Jinaut brought Gonzalez's clothes into the living room and looked for matches, threatening to damage the clothes. Meanwhile, Gonzalez called 911, and the police and Fire Department responded to the apartment.

Jinaut testified that when the police arrived, two officers spoke with him in the hallway while two other officers spoke with Gonzalez in the living room. Gonzalez told the officers that she just wanted Jinaut to leave and get some fresh air. Jinaut suggested that he take a walk with his one-year-old son to help get the child back to sleep. The officer asked Gonzalez if Jinaut could take the child. Gonzalez said no, and the officers instructed Jinaut to leave the premises. Jinaut explained that he did not comply because "it was about one something in the morning and now I felt, especially in the neighborhood I lived in, it's not the proper time to be walking around outside." The officers told Gonzalez that if he did not leave, they would forcibly remove him from the scene. Jinaut explained that because he did not want his son to witness anything negative, he told the officers that he would leave on his own volition. When Jinaut stood up to leave, one of the officers pushed him from behind. Jinaut responded, "I am not handicapped. I don't need no help to get out towards the door." When he exited the apartment, Jinaut slammed the door because he was upset. As Jinaut turned toward the stairs, he saw that his son had exited the apartment. When Jinaut went to pick up his son,

an officer grabbed the child away. Because the child could have gotten hurt, Jinaut yelled, "What the fuck are you doing?" The officer replied, "[Y]ou don't tell me what the fuck to do." At that point, according to Jinaut, the three other officers came out into the hallway. One of the officers handcuffed Jinaut's left hand, and Jinaut was taken down to the floor. Two or three officers were on Jinaut's back. Jinaut testified that he started getting kicked in the face as the officers reached for his right hand. The kicks continued, but Jinaut would not give the officers his right hand because he needed it to protect his face. When the kicking stopped, he gave them his hand. Jinaut identified the Respondent, in court, as the officer who kicked him. When asked how he knew it was the Respondent who kicked him, Jinaut replied, "I remember seeing [the Respondent] when I finally got a chance to sit up." Jinaut stated that he sustained a fractured jaw and sought medical treatment at Brookdale Hospital. [DX 2 is a copy of the medical records, dated October 6, 2005.]²

[At this point it should be noted that the Assistant Department Advocate re-opened this case, on August 2, 2007, to inform the Court that Jinaut made prior statements in his CCRB interview and to the Assistant Department Advocate that were inconsistent with the statement he made at trial where he testified that he saw the Respondent kick him. During his interview with CCRB investigator Reid, he was asked which officer kicked him and he replied "That was the Arabic officer my fiancé said it was the Arabic looking officer that was kicking me..." He was then asked did he see the officer and he replied "No, it was my fiancé who seen him." The Assistant Department

² The medical records consisted of a one page document that is almost entirely illegible. The Court, therefore, cannot determine from this document whether Jinaut suffered a broken jaw and the only other evidence offered in support of this injury came from Jinaut's testimony at trial.

Advocate also stated that Jinaut informed him that he did not see who kicked him and it was Gonzalez who said it was the Respondent.

The Court also read the portion of the CCRB interview where Jinaut claimed to have suffered a loose tooth and also suffered an injury to his lower back, and was receiving physical therapy for that injury. The Court, however, could not find any mention of a broken jaw in his CCRB statement.] (DX 3)

On cross-examination, Jinaut testified that he is between 5'10" and 6'0" in height. At the time of the incident, he weighed 260 pounds. He stated that Gonzalez started the argument that night. He clarified that he threw the ten-pound baby bouncer against the wall, not at Gonzalez. He reiterated that when he left the apartment, he slammed the door because he was upset. He testified that it is the kind of door that locks automatically, but he did not know if the door stayed completely closed when he slammed it. The police instructed him to leave the apartment four times before he actually left. The first three times, he told the officers that he did not want to leave because it was so late. He explained that he is afraid to go outside at night because he lives in a high-crime area.

When asked if he resisted arrest, Jinaut replied, "No, sir, unless you are talking about when I refused to give my right hand because I was being kicked in my face. That's different." According to Jinaut, the officers never told him that he was being arrested. He testified that he did not know which of the officers handcuffed his left hand and swung him to the ground. He stated that he could not really see what was going on because he "was having [his] face kicked in." He had no idea how many times he was kicked in the face. When he got up, he was bleeding from his mouth and his tooth was on the floor. There was also blood on the floor.

Jinaut testified that while he “was bleeding from [his] mouth” he did not remember if he asked for medical attention at the precinct. He also stated that he “did not refuse medical attention” because he “was not asked for any medical attention.” Nor did he remember asking for medical attention at the scene. [During his CCRB interview, however, he stated “I didn’t think I was supposed to request it [medical attention.] I wasn’t in that and I wasn’t asked if I needed medical attention at all until transport came to pick me up at like around 10:00 something in the morning. Basically when the transport came to pick me up to take me to Central Booking was when they, they asked me do I need medical attention. And when I requested well if I take medical attention what will happen to me. They said well you’ll have to return back to the 67 and continue the process all over again. About this time I definitely declined because I wanted to get back to my family as, as soon as possible.”] (DX 3)

Jinuat testified that he never punched or used any force whatsoever against any of the officers. He stated that he would not punch anybody in the face because he is not that type of person. He explained that he would have to be provoked before he punched someone, and he did not feel provoked when the officers ordered him to leave the apartment or when one of the officers grabbed his son away.

Jinaut discussed the incident with an attorney three days after it happened. A week or two later, he sought more medical treatment. Jinaut stated that he is not sure if he has initiated a civil action based on the incident. All four officers were involved in apprehending him.

The Respondent's Case

The Respondent called Police Officer Brandon Lipes as a witness and the Respondent testified in his own behalf.

Police Officer Brandon Lipes

Lipes, a three-year member of the Department, is currently assigned to the 67 Precinct. On October 5, 2005, he was partnered with the Respondent. They were not steady partners, but they had worked together a couple of times. Shortly after midnight, they responded to a radio run for an assault in progress at Gonzalez and Jinaut's apartment. Upon their arrival at the scene, they observed Fire Department personnel and other police officers already there. When Lipes and the Respondent felt in control of the situation, they let the firemen and other officers leave. Gonzalez seemed very scared and hysterical. She told them that Jinaut threw a plate at her and had threatened her with knives. Jinaut was sitting on the couch and seemed angry, but Gonzalez told the officers that she did not want Jinaut arrested. Two small children were in the room. When Lipes told Jinaut to leave the apartment for an hour or two until the situation calmed down, Jinaut replied, "This is my house. I don't want you here. I am not afraid of you. I will fight you right now." Lipes reiterated numerous times that Jinaut should leave the apartment. According to Lipes, each time Jinaut replied, "I will fight you right now. I am not afraid of you."

Lipes testified that Jinaut eventually left the apartment but then tried to come back inside. Lipes explained that while he was taking a Domestic Incident Report (DIR) from Gonzalez, Jinaut kicked the front door open. Lipes told Jinaut in a controlling voice that

he would be arrested if he kicked the door open again. A minute or two later, Jinaut kicked the door again. Lipes and the Respondent went out to the hallway, where Lipes informed Jinaut that he was under arrest and instructed him to put his hands behind his back. When Lipes started to handcuff Jinaut, Jinaut punched Lipes on the side of the face. At that point, Lipes and the Respondent started wrestling Jinaut in an attempt to handcuff him. According to Lipes, Jinaut was "basically just manhandling us, throwing us all over the place." Lipes is 5'9" or 5'10" tall and weighed 150 pounds at the time of the incident. He described Jinaut as two or three times his size. Lipes, the Respondent, and Jinaut all fell to the ground with the two police officers falling on top of Jinaut. Once on the ground, there was still some struggle, but the officers were finally able to handcuff Jinaut. There were no other officers at the scene during the struggle. Jinaut was arrested for assault, menacing, disorderly conduct, and obstructing governmental administration. Jinaut filed a CCRB complaint against Lipes, but the allegations against Lipes were ultimately unsubstantiated or exonerated.

Lipes testified that he experienced pain and redness to his face, but he never received medical treatment after being punched in the face by Jinaut. Lipes stated that when he picked Jinaut up from the ground, there was not a pool of blood. There was no blood on Jinaut's shirt, and Lipes did not see a tooth on the floor. He added that Jinaut did not complain about his medical condition.

Lipes requested the response of a patrol supervisor, and a Sergeant Cowan responded to the scene to verify the arrest. Lipes and the Respondent transported Jinaut to the 67 Precinct Station House. When Jinaut was asked at the station house if he wanted medical attention, Jinaut declined. [Respondent's Exhibit A is a copy of the 67

Command Log for October 5, 2005. The 1:45 a.m. entry pertaining to Jinaut's arrest indicated that Jinaut's physical/mental condition at the time was "apparently normal."]

On cross-examination, Lipes testified that Jinaut was uncooperative and resisted arrest. Jinaut ignored the Respondent's instructions to leave his son in the apartment. According to Lipes, the Respondent was not frustrated with Jinaut's lack of cooperation, and at no point while Jinaut was on the ground did the Respondent kick Jinaut in the face.

The Respondent

The Respondent, a three-year member of the Department is currently assigned to the 67 Precinct. He testified that when he and Lipes arrived at Gonzalez and Jinaut's apartment, Fire Department personnel and Police Officers Ventre and Zwarin were already there. Jinaut was sitting on the couch and Gonzalez was crying hysterically. When the Respondent and Lipes felt in control of the situation, they let Ventre and Zwarin leave. Gonzalez informed the officers that Jinaut had thrown a plate at her, but she did not want him arrested. She wanted instead for Jinaut to take a walk "to cool things down." The officers told Jinaut numerous times to leave the apartment for a while. The Respondent described Jinaut as stubborn. According to the Respondent, Jinaut mumbled under his breath, "I will take all you guys on. I'm not scared of you." The Respondent stated that Jinaut seemed irritated and upset, and he acted as if he did not have to listen to the police. Eventually, Jinaut left the apartment and slammed the door behind him. The door, however, remained slightly open. The Respondent stated that the lock on the door might have been broken or the door was uneven.

Lipes started to take the DIR from Gonzalez. Meanwhile, one of Gonzalez's children was walking around the living room. When Jinaut started calling the child out to the hallway, Gonzalez grabbed the child back. The Respondent told Jinaut that he could not take the child outside with him. The officers went on to tell Jinaut that it was not safe to take the child out at night because the baby was not dressed, it was cold outside, and the neighborhood was dangerous. Jinaut replied, "[Y]ou can't tell me what the fuck to do." Jinaut then kicked the door open. The officers at first ignored Jinaut but then decided to arrest him when he kicked the door a second time.

The officers approached Jinaut in the hallway, and Lipes told him to turn around and put his hands behind his back. At that point, the Respondent observed Jinaut punch Lipes in the face. When the Respondent grabbed Jinaut's arm, Jinaut was able to swing him "around like a rag doll." Meanwhile, Lipes grabbed Jinaut's other arm. Jinaut still refused to put his hands behind his back. The Respondent believed that because Jinaut was so strong, it would not be possible to handcuff him as long as he was standing. As he learned in training, the Respondent kicked Jinaut's leg out from under him, causing Jinaut and both officers to fall to the ground. Once on the ground, it still took the officers approximately 30 seconds to successfully handcuff Jinaut.

When they lifted Jinaut to his feet, the Respondent did not see blood or a tooth on the ground. There was blood on Jinaut's lip, and the Respondent stated that it looked like Jinaut had cut his lip. Jinaut did not complain about any injury. The officers called for a patrol supervisor, who arrived at the scene in approximately five minutes. The sergeant verified Jinaut's arrest. The Respondent and Lipes proceeded to transport Jinaut to the station house.

While in the car and again in the station house, the officers asked Jinaut if he needed any medical attention. Both times, Jinaut refused medical attention. The Respondent testified that at no point during the incident did he kick Jinaut in the head. The Respondent is 5'7" tall and weighed 160 pounds at the time of the incident.

On cross-examination, the Respondent testified that Jinaut was uncooperative and basically ignored police instruction. The Respondent did not like it when Jinaut hit Lipes. The Respondent stated that he was not angry at Jinaut, but he was in fear for his safety. While on the ground, Jinaut was defenseless.

FINDINGS AND ANALYSIS

The Respondent has been charged with using excessive force against Jinaut by kicking him in the face causing him to lose a tooth. Jinaut testified that the Respondent repeatedly kicked him in the face without cause. The Respondent, in contrast, testified that he never kicked Jinaut in the face but rather kicked his legs out from under him in order to bring a resisting Jinaut down to the ground. For the following reasons, I find that the Department failed to prove its case by a preponderance of the credible evidence.

First, while the Respondent and Lipes testified that Jinaut punched Lipes in the face, Jinaut testified that he never used any physical force against any of the officers. Jinaut went on to testify that he would not punch anybody in the face because he is not that type of person. I do not find Jinaut's self-depiction as a pacifist to be particularly convincing given that it went undisputed at trial that Jinaut threw things during his argument with Gonzalez, injured Gonzalez's foot by breaking a plate on the ground, and threatened to light her clothes on fire. It also went undisputed that after the police arrived

at the scene, Jinaut disregarded repeated orders to leave the premises, yelled at the officers, slammed the door because he was upset, and refused to give the officers his hand as he was being arrested. It is clear that on the night of the incident Jinaut was angry, violent, and uncooperative. The Court is therefore persuaded that Jinaut gave the Respondent and Lipes cause to use physical force against him. This conclusion is further supported by the fact that Jinaut is significantly larger in stature than both officers and is not inconsistent with Gonzalez's CCRB statement since she conceded that she did not see the initial physical contact between Jinaut and the officers in the hallway. Even Reid, the CCRB investigator who worked on this case, determined that Jinaut resisted arrest that night.

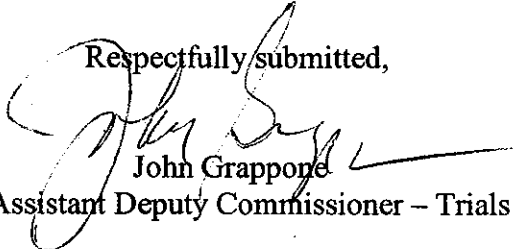
Second, the injuries that Jinaut sustained were not consistent with his claim that he was repeatedly kicked in the face; but rather, were consistent with the Respondent's account of the incident. While Jinaut did go to the hospital after being released, he declined offers for medical treatment while in custody. Even if (as Jinaut testified) the Respondent and Lipes never extended such an offer to him, it is standard procedure for all prisoners to be screened by medical personnel when they go to Central Booking. If the incident occurred as Jinaut described, he would have been in obvious need of immediate medical attention. Instead, the evidence (or lack thereof) indicates that Jinaut may have suffered only a minor injury that went unnoticed by both the patrol supervisor who responded to the scene and the desk officer on duty that tour (as evinced by the precinct Command Log for that day).

Third, although Jinaut identified the Respondent at trial as the officer who kicked him, he conceded in his CCRB interview that he never actually saw who kicked him. He

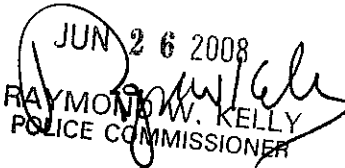
explained that he later learned from Gonzalez that it was the “Arabic-looking officer that was kicking.” Thus, the identification of the Respondent as the officer who kicked Jinaut was seemingly based entirely on Gonzalez’s observations. While Gonzalez’s CCRB transcript was basically consistent with Jinaut’s version of the incident, her absence precluded the Respondent’s counsel from having the opportunity to cross-examine her regarding the truthfulness of her CCRB interview and the accuracy of her identification. The Court, in her absence, has no way of knowing whether Gonzalez’s failure to appear was because her testimony under oath would reveal a scenario different from Jinaut’s and caused her to fear Jinaut’s possible wrath. Therefore, even assuming *arguendo* that Jinaut was, in fact, kicked in the face during his arrest, there is not sufficient evidence that it was the Respondent who did it.

Based on all of the foregoing, the Respondent is found Not Guilty.

Respectfully submitted,


John Grappone
Assistant Deputy Commissioner – Trials

APPROVED


JUN 26 2008
RAYMOND W. KELLY
POLICE COMMISSIONER